SELECT SPECIAL CONFLICTS OF INTEREST ACT
REVIEW COMMITTEE

REVIEWING THE *CONFLICTS OF INTEREST ACT*:

A DISCUSSION GUIDE

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PREPARED BY:

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INTRODUCTION

The *Conflicts of Interest Act*, R.S.A. 2000, c. C-23, governs the ethical conduct of Members of the Legislative Assembly (MLAs), Members of the Executive Council, former Ministers, and former political staff members. The Act came into force in the spring of 1993 and has been reviewed and amended on several occasions since its inception.

A review of the Act was conducted in 1996 which resulted in a report entitled *Integrity in Government in Alberta: Towards the Twenty First Century*, more commonly known as the Tupper Report. One of the recommendations from this report was that a committee of the Legislature be established every five years to review the Act to ensure its relevance and applicability "in light of changing public expectations, alterations to the role of government, and changes in the responsibilities of Members."[1] Section 48 of the Act stipulates that

> By December 1, 2012 and every 5 years after that, a special committee established by the Legislative Assembly must begin a comprehensive review of this Act and must submit to the Legislative Assembly, within one year after beginning the review, a report that includes any amendments recommended by the committee.

On October 23, 2012, Government Motion 13 was agreed to by the Assembly and members were appointed to the Select Special Conflicts of Interest Act Review Committee of the Legislative Assembly of Alberta to review the *Conflicts of Interest Act*, R.S.A. 2000, c. C-23, as prescribed pursuant to section 48 of that Act. On November 27, 2012, the all-party committee of Alberta MLAs met to begin its review.

At the request of the Committee, a stakeholder list was prepared and stakeholders were contacted to request their input into the review process. The Committee requested a discussion guide be developed to provide background information and context for its review of the Act. This discussion guide has also been made available to stakeholders and members of the public who wish to contribute to the review process.

The Legislative Assembly Office's Research Services consulted with the Office of the Ethics Commissioner and representatives from the Department of Justice and Solicitor General to focus this discussion guide on issues relevant to the legislation, including some that were debated in the previous review in 2005-2006 as well as issues that have emerged since the coming into force of the *Conflicts of Interest Amendment Act, 2007*, S.A. 2007, c. 28. Additional issues may arise over the course of the Committee's review, including at meetings with the Office of the Ethics Commissioner and Ministry of Justice and Solicitor General, and in the consultation with stakeholders and members of the public. This discussion guide is not a comprehensive analysis of every possible issue that pertains to the Act's provisions or the application and administration of the legislation. Rather, it endeavours to provide context for some of the provisions that have arisen. The accompanying questions intend to serve as a starting point to prompt discussion.

[1] Alberta, Conflicts of Interest Act Review Panel, *Integrity in Government in Alberta: Towards the Twenty First Century*, (Edmonton, Alberta: Conflicts of Interest Act Review Panel, January 1996), p. 40.

SCOPE AND INTERPRETATION OF THE ACT

DEFINITIONS – DIRECT ASSOCIATES

The *Conflicts of Interest Act* applies to "Members" who are defined in section 1(1)(c) as Members of the Legislative Assembly and includes Ministers, whether or not the Ministers are Members of the Legislative Assembly.

Throughout the Act there are references to persons "directly associated" with a Member. Under section 1(5) a person is directly associated with a Member if that person is

(a) the Member's spouse or adult interdependent partner,
(b) a corporation having share capital and carrying on business or activities for profit or gain and the Member is a director or senior officer of the corporation,
(c) a private corporation carrying on business or activities for profit or gain and the Member owns or is the beneficial owner of shares of the corporation;
(d) a partnership
    (i) of which the Member is a partner, or
    (ii) of which one of the partners is a corporation directly associated with the Member by reason of clause (b) or (c), or
(e) a person or group of persons acting with the express or implied consent of the Member.

The Act further defines the following terms in section 1(1):

"Private corporation" means a corporation none of whose shares are publicly traded securities.

"Senior officer" means, with reference to a corporation,
(i) the president, vice-president, secretary, comptroller, treasurer or general manager of the corporation, or
(ii) any other person who performs functions for the corporation similar to those normally performed by persons holding the offices referred to in subclause (i)

"Spouse" means "the husband or wife of a married person who is a Member but does not include a spouse who is living separate and apart from the Member if the Member and spouse have separated pursuant to a written separation agreement or if their support obligations and family property have been dealt with by a court order."

The Act specifically defines "minor child" as "a minor to whom a Member has demonstrated a settled intention to treat as a child of the Member's family." Minor children are referenced throughout the Act, as are adult children. Some provisions specify one or the other and some provisions specify both.

QUESTIONS:

1. **Is the list of parties that are deemed to be directly associated with a Member appropriate? Does it cover all the parties that ought to be covered by the Act? Are there any parties that are classified as direct associates that should not be? Do any of the terms require further definition or clarification?**

2. **Should adult children be added where minor children are identified in the Act? Should the definition of "child" be clarified to include both adult and minor children? Are there parts of the Act where a distinction should be made between adult children and minor children?**

DEFINITIONS – CROWN AND PROVINCIAL AGENCY

In section 1(1), the Act defines "Crown" to mean "the Crown in the right of Alberta and includes a Provincial agency." It further defines "Provincial agency" to mean "a Provincial agency as defined in the *Financial Administration Act* but does not include a corporation enumerated in section 2(5) of that Act." Section 1(p) of the *Financial Administration Act* defines Provincial agency as a provincial corporation—whereupon the majority ownership is held by the Crown—and a provincial committee—whereupon a majority of members are appointed by the Crown. As such, where the Act refers to the Crown, Provincial corporations and Provincial committees are included.

Since Provincial agencies fall under the definition of Crown, section 6 (restricting Crown employment), section 8 (restricting contracts with the Crown), and section 9 (governing payments from the Crown), restrict Members' interactions with Provincial corporations and committees. For example, according to section 8, a Member breaches the Act if the Member becomes a party to a contract with the Crown while in office. Given the definition of "Crown," a Member could be in breach of the Act if he or she becomes a party to a contract with a Provincial committee.

QUESTIONS:

3. **Are the definitions of Crown and Provincial agency appropriate? Is it appropriate to include Provincial agencies in the definition of Crown?**
4. **Given that the definition of Crown incorporates Provincial corporations and committees, are the scopes of section 6 (restricting Crown employment), section 8 (contracts with the Crown) and section 9 (payments from the Crown) appropriate or should they be narrowed? Should the scope and application of the definition of Crown be made clearer?**

DEFINITIONS – PRIVATE INTERESTS

Many provisions in the Act are written to prevent Members from inappropriately attempting to advance a private interest.

Section 1(1)(g) states that "private interest" does not include the following:

(i) an interest in a matter

(A) that is of general application,
(B) that affects a person as one of a broad class of the public, or
(C) that concerns the remuneration and benefits of a Member;

(ii) an interest that is trivial;

(iii) an interest of a Member relating to publicly traded securities in the Member's blind trust;

QUESTION:

5. **Should the definition of "private interest" be rewritten to include what is considered to be a private interest rather than what is not?**

PRIVATE INTERESTS – DISCUSSIONS AND VOTING PRIVILEGES

In their roles as Members of the Legislative Assembly, Members debate and vote on issues in the Assembly, may serve as members of the Executive Council if they are ministers, and may serve on committees of the Legislative Assembly or the Executive Council that study issues and examine policies. The provisions on private interests, outlined in section 2 and section 3 of the Act, aim to ensure that a Member does not use his or her position to influence decisions from which he or she will gain personally. In the above-mentioned meetings, a Member may participate in discussions and voting regarding any of the matters excluded by section 1(1)(g) of the Act, as they are not considered to be private interests. For example, a Member who is a teacher may participate in discussions surrounding an educational issue because such a matter is of "general application" and "affects a person as one of a broad class of the public." He or she may be unable, however, to participate in debates and votes surrounding remuneration of teachers as the decision may affect the financial position of the Member. Section 2(2) of the Act addresses situations in which a Member, the Member's minor or adult child, or a person directly associated with the Member has a private interest. In this situation, Members must declare that interest and must withdraw from the meeting without voting on or participating in the consideration of the matter.

In the review of the *Conflicts of Interest Act* in 2005-2006 an issue was raised regarding whether a Member with expertise in a subject area should be allowed to participate in discussions surrounding that topic while refraining from voting. The Committee debated the merits of participation in meetings by Members who have expertise in the area of discussion, particularly when the discussion is on issues impacting his or her profession financially. The Committee agreed on the benefits of having an expert viewpoint on topics; however, there was debate on allowing those Members to discuss and vote on those issues. A distinction was raised between voting on matters that affect one's profession and voting on matters from which one can receive a personal gain. Points were raised in favour of allowing a Member to vote, as some Members argued that representing his or her own profession was within the "duties" of an MLA. However, arguments were also made that many matters affecting a profession would directly or indirectly result in personal gain. The result of the discussion was that this provision remained unchanged.

QUESTIONS:

6. **Should Members be allowed to participate in discussions on subjects in which they may have a personal or professional interest? Should Members be allowed to vote on decisions in meetings that will affect their personal or professional interests? Should Members be allowed to vote on issues in which they have a personal or professional interest but only if there is no potential for personal gain?**

An issue that arises in the discussion of private interests is the matter of actual conflicts of interest compared to apparent conflicts of interest. The *Integrity in Government in Alberta: Towards the Twenty First Century* report, known as the Tupper Report, in 1996 recommended that the Act should incorporate the idea of apparent conflicts of interest because, according to the report, even an apparent conflict of interest has the potential to undermine public confidence and trust.

The Tupper Report recommended that Alberta follow what British Columbia's legislation provides concerning apparent conflicts of interest by incorporating a provision that states that "a member has an apparent conflict of interest where there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest."[2] In the 2005-2006 review, the Office of the Ethics Commissioner responded that this inclusion could give rise to "vexatious and frivolous complaints," as persons raising allegations of apparent conflicts of interest are likely to have a partisan viewpoint.

[2] Alberta, Conflicts of Interest Act Review Panel, *Integrity in Government in Alberta: Towards the Twenty First Century*, (Edmonton, Alberta: Conflicts of Interest Act Review Panel, January 1996), p. 25.

Furthermore, although the criterion of reasonableness is often applied in courts of law, some committee Members felt that the definition of "reasonable" in this context would be too subjective and would open the door for accusations based on opinion rather than fact. Some Members also felt that this would increase the scope of the Act too broadly, while other Members argued that the scope of the Act was actually too narrow. The result of this discussion was that apparent conflicts of interest were not included in the Act.

QUESTIONS:

7. **Should apparent conflicts of interest be incorporated into the Act? If so, how should "apparent conflicts of interest" be defined? What are the advantages and disadvantages of incorporating apparent conflicts of interest into the Act? Is there potential for abuse?**

GIFTS, BENEFITS FROM PERSONS OTHER THAN THE CROWN

Section 7(1) of the Act states that

> A Member breaches this Act if the Member or, to the knowledge of the Member, the Member's spouse or adult interdependent partner or minor child accepts from a person other than the Crown a fee, gift or other benefit that is connected directly or indirectly with the performance of the Member's office.

The goal of this section is to avoid questions of objectivity and impartiality of the Member and to ensure that the integrity of the Government and the Assembly is not compromised.[3]

Section 7(2) states that subsection (1) does not apply if the total value of the fees, gifts, and benefits received from the same source (as an incident of social protocol or of the social obligations that normally accompany the responsibilities of the Member's office) is $400 or less in a calendar year, or if that Member seeks approval for retention of the fee, gift, or benefit from the Ethics Commissioner. The Act provides that the Ethics Commissioner may give approval to retain a gift if he or she is satisfied that there is no reasonable possibility that retention of the fee, gift, or other benefit will create a conflict between a private interest and the Member's public duty.

Section 7(2.1) resulted from a recommendation from the 2005-2006 Review Committee and was added to the Act by the *Conflicts of Interest Amendment Act, 2007*. It states that the provisions pertaining to the receipt of fees, gifts, and benefits provided in subsection (1) do not apply to a gift or other non-monetary benefit that is accepted by the Member or the Member's spouse or adult interdependent partner or minor child from the Member's political party or constituency association or from a charitable organization. The rationale for this provision came from discussions in the review that drew a distinction between gifts that are expendable or consumable, such as tickets to a dinner, and gifts that have a tangible value, such as a painting. It was argued that tickets to political fundraisers and charitable fundraisers should not count toward the $400 annual limit because Members in their roles often receive many invitations and tickets to fundraisers which they attend in the performance of their duties as elected officials, rather than to receive a personal benefit. Additionally the individual would not have been given these tickets if the individual was not an MLA. As such, it was argued that these "benefits" should be considered necessary to the performance of the role of an MLA and accepting them should not be considered in breach of the Act. Fundraiser tickets are also considered to be a "consumable" benefit as there is often a meal at the event and they therefore differ from material objects that have a clear monetary value. Furthermore, members of the 2005-2006 Review Committee contended that they often receive many tickets to many events, which may accumulate to an amount greater than the $400 limit within a year.

Following the 2005-2006 review, the $200 limit, which was set in 1998, was increased to $400.

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[3] Alberta, Legislative Assembly, Select Special Conflicts of Interest Act Review Committee, *Final Report May 2006*, (Edmonton, Alberta: May 2006), p. 16.

QUESTIONS:

8. **Should the Act distinguish between accepting a gift or benefit for personal gain and accepting it as a matter of social protocol? If so, how should this be done?**
9. **Are the use of the terms "fees," "gifts," "benefits," and "non-monetary benefits" appropriate in their respective contexts? Should the terms be defined?**
10. **Should the Ethics Commissioner have the authority to provide exemptions for gifts and benefits received? What should be the conditions under which the Ethics Commissioner may provide an exemption?**
11. **Is the provision in section 7(2.1) regarding exclusions to the acceptance of gifts and non-monetary benefits from constituency associations and charitable organizations appropriate? Is it too broad or too narrow? Is there potential for abuse? Should the exclusion in section 7(2.1) apply to fees (i.e., monetary benefits) as well?**
12. **Is the $400 limit on gifts and benefits appropriate? If not, should the amount be raised or lowered?**

TRAVEL ON NON-COMMERCIAL AIRCRAFT

The 2005-2006 Review Committee, in its report, recommended the inclusion of a provision governing travel by a Member on private air carriers or air carriers owned by private institutions (but excluding government-owned or leased aircraft). It was included in the amending legislation and subsequently incorporated into the Act as section 7.1. This provision states in subsection (2) that "A Member breaches this Act if the Member accepts travel on a non-commercial chartered or private aircraft for any purpose." A representative from Alberta Justice stated in the 2005-2006 review that the intention of this provision is to avoid the appearance of favouritism or the opportunity for lobbying being given to a private company by a Member. Subsection 3(a) allows for travel on non-commercial aircraft by a Member if he or she is travelling in his or her capacity as a Member of the Legislative Assembly, as a member of the Executive Council, or as the holder of an office to which the Member is elected or appointed by the Legislative Assembly.

The Ethics Commissioner originally recommended in the 2005-2006 review that Members be required to consult with the Ethics Commissioner before accepting a flight on a non-commercial aircraft. However, questions arose in discussions regarding the practicality of this in a situation where a Member is either not able to reach the Ethics Commissioner or where the matter is urgent. In these circumstances, it was argued that it would not be practical to consult with the Ethics Commissioner prior to accepting the flight. Currently, the Act requires Members to inform the Ethics Commissioner within seven days after the travel is completed.

The Office of the Ethics Commissioner has found through its interaction with Members that Members find subsection 3(a) to be confusing regarding what is within a Member's capacity as a holder of certain offices. This point was also brought up in the 2005-2006 review in which it was discussed how to apply the provision when the travel fell within the duties of an MLA, that is, how to determine whether the flight is necessary to perform a Member's duties or whether it is merely a flight of convenience. This provision appears to create an issue for the Member. If he or she is unsure about whether a flight is being taken in his or her capacity as a Member, the Member may have to incur the expense of using commercial air travel.

QUESTIONS:

13. **Should Members be required to consult the Ethics Commissioner regarding private air travel prior to accepting the travel? Is it sufficient to report the occurrence after the fact, as long as it is disclosed?**
14. **Section 7.1(3)(a) provides that a Member is not in breach of subsection (2) if he or she is travelling within his or her capacity as a Member of the Legislative Assembly. What should be considered to be within a Member's capacity when considering non-commercial aircraft travel?**
15. **Should sanctions be made available to the Ethics Commissioner regarding accepting private air travel when the Commissioner deems that there is a conflict?**
16. **How should the benefit of accepting private air travel be weighed against saving taxpayers money?**

CONTRACTS WITH THE CROWN

Section 8 provides that a Member is in breach of the Act if the Member or the Member's spouse or adult interdependent partner or direct associate becomes a party to a contract with the Crown. Section 8(1)(a) of the Act specifically outlines a breach if the aforementioned parties borrow money from a treasury branch. With respect to the renewal of a contract, which may arise, for example, with a treasury branch mortgage, a Member is not in breach of the Act if the contract was already in place at the time of his or her becoming a Member and if the Ethics Commissioner grants approval of the contract's renewal. The Ethics Commissioner may grant approval of renewal if he or she deems that the provisions of renewal are fair and reasonable in the circumstances, having regard to the provisions of the existing contract; the renewal will be effected in accordance with the provisions of the contract pertaining to its renewal; and the holder of the contract has not received any preference from the Crown in relation to the renewal.

Alberta Treasury Branches (ATB Financial, formerly ATB) is a Crown corporation that operates under the authority of the *Alberta Treasury Branches Act*, RSA 2000, c. A-37. According to discussions in the 2005-2006 review, legislation governing borrowing from treasury branches was put in place due to the actions of two MLAs in the mid-1950s who were alleged to have obtained loans from Alberta Treasury Branches which led to inquiries that negatively impacted the governing party in the subsequent election. The *Legislative Assembly Act, 1955*, S.A. 1955, c. 62, was amended shortly after the election to prohibit MLAs from borrowing from Alberta Treasury Branches. As noted above, this prohibition now appears in the *Conflicts of Interest Act*. Since 2002, ATB has been renamed ATB Financial and has committed to acting as a competitive financial institution rather than a Government treasury branch. For this reason, the above provisions restricting borrowing from treasury branches should be reviewed to determine whether they are necessary given ATB's essential independence from the Crown.

The 2005-2006 Review Committee made recommendations to allow the Ethics Commissioner to approve a Member's renegotiation or renewal of an ATB Financial mortgage and also recommended that a Member should be compensated for the costs of transferring a mortgage from ATB Financial to another financial institution where required to do so by the Ethics Commissioner. The former recommendation was implemented; however, there was no implementation of the recommendation to compensate for the costs of transferring a mortgage.

The 2007 amendment expanded the parties listed under this provision of the Act to include direct associates of spouses and adult interdependent partners.

QUESTIONS:

17. **Should the provisions regarding contracts with Alberta Treasury Branches be maintained in the Act, considering that ATB Financial is operating essentially independently of the Crown?**
18. **Should Members be compensated for the costs of transferring a mortgage from ATB Financial to another financial institution if such a transfer is required by the Ethics Commissioner?**

PUBLIC DISCLOSURE STATEMENTS

Section 14(3) of the Act requires public disclosure by Members of assets, liabilities, financial interests, and sources of income; fees, gifts, or benefits approved for retention under section 7(2)(b); and any travel accepted under section 7.1. Included in the exclusions from public disclosure in section 14(4) are assets, liabilities, or interests having a value of less than $10,000 and sources of income of less than $5,000 per year. The monetary limits were raised following the 2005-2006 review to be more consistent with monetary limits of other Canadian jurisdictions.

The Office of the Ethics Commissioner currently receives paper rather than electronic disclosure statements. Disclosure statements are then retained and made available to the public through the Clerk of the Legislative Assembly. In a motion approved on January 31, 2012, the Standing Committee on Legislative Offices resolved to refer the issue of the electronic availability of Members' public disclosure statements to the Select Special Conflicts of Interest Act Review Committee. Through electronic availability, the Office of the Ethics Commissioner would be able to post disclosure statements on its website to enhance public accessibility. While this may provide greater accessibility and foster transparency, it may also create privacy concerns in that upon a Member's exit from public duty, while his or her disclosure statement may be removed from the website, it may not be permanently removed from the Internet.

QUESTIONS:

19. **Are the monetary limits for public disclosure ($10,000 for assets, liabilities, and interests; $5,000 for sources of income) appropriate?**
20. **Is it appropriate that public disclosure statements are currently accessible through the Clerk of the Legislative Assembly, or would it be more appropriate for the Office of the Ethics Commissioner to retain and make available this information? Should Member disclosure statements be made public electronically through the website of the Office of the Ethics Commissioner? What are the advantages and disadvantages of public disclosure on the Internet?**

BLIND TRUSTS

Many Members have investments in publicly traded securities. However, under the Act, Ministers and the Leader of the Official Opposition may only possess publicly traded securities if they are kept in a blind trust or if they are given prior permission by the Ethics Commissioner to acquire ownership of such publicly traded securities (section 20). Defined in section 1(7), a trust is considered blind if it meets certain criteria, including that the Member gives sole power over investment decisions to a trustee, who must be approved by the Ethics Commissioner. The Ethics Commissioner checks to ensure that there is no relationship between the Member and the trustee that would impact the performance of the trustee's role. The implementation of a blind trust avoids a situation where a Member is involved in decision-making that

the Member knows may impact his or her investments. With blind trusts, since the Member has no knowledge of his or her portfolio contents, decisions can be made objectively.

While blind trusts cover publicly traded securities, they do not cover assets other than publicly traded securities. Many Members come into elected office from private corporations, holding top management positions or owning the company itself. Legislation in some Canadian jurisdictions allows "management trusts," in which Members who own private companies would be able to retain ownership, but would hand over the day-to-day operation and decision-making to a trustee.[4] Currently, management trusts are not specifically permitted as a tool to avoid conflicts of interest under Alberta's legislation; however, they are indirectly allowed under section 21(2) with respect to employment restrictions on Ministers and the Leader of the Official Opposition if the Ethics Commissioner concludes that there is no conflict or apparent conflict between a Minister's private interest and his or her public duty.

A management trust removes the decision-making power from a Member and thereby may prevent a potential conflict from arising in connection with the Member's public role. Management trusts allow a Member to maintain some interest in the company while creating distance so that there is no appearance that the Member is using information that he or she receives in his or her public role to help advance his or her private interests. Discussions in the 2005-2006 review regarding management trusts indicated that many members of the Committee did not believe that management trusts were truly arms-length but rather that they created an appearance of a conflict of interest. As a result, management trusts were not incorporated into the legislation.

Due to the plethora of new investment products on the market, the Committee may wish to examine other investment options available on the market and determine whether they could be utilized in addition to, or possibly in place of, blind trusts as a method of managing conflicts of interest.

QUESTIONS:

21. **Are the rules for blind trusts appropriate? What could be improved?**
22. **Should Members be allowed to establish trusts for the management of their private corporations and thereby avoid the creation of a conflict of interest under the Act? Should the creation of a management trust allow the Member to participate in discussions and votes in meetings which may affect his or her corporation's interests?**
23. **Are there other types of investment instruments that should be allowed in addition to or instead of blind trusts? What are they?**

INVESTIGATION INTO BREACHES

Section 24 of the Act currently enables the Ethics Commissioner to conduct an investigation into breaches of the Act by a request, in writing, made by any member of the public, any Member of the Legislative Assembly, or by a resolution of the Legislative Assembly or the Executive Council. Under section 25(1) of the Act, the Ethics Commissioner does not have the power to initiate investigations unless he or she has reason to believe that a Member, former Minister, or former political staff member has acted or is acting in contravention of advice, recommendations or directions or any conditions of any approval or exemption given by the Ethics Commissioner to that individual. For example, if the Ethics Commissioner receives an anonymous tip regarding a breach of the Act, he or she may not initiate an investigation. By comparison, the Lobbyist Registrar, who receives his or her authority from the Ethics Commissioner, does have powers to initiate investigations under the *Lobbyists Act*, S.A. 2007, c. L-20.5.

The Ethics Commissioner has the authority under section 25(4) of the *Conflicts of Interest Act* to refuse to investigate or cease to investigate an alleged breach if he or she is of the opinion that the request is

[4] *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287; *The Members' Conflict of Interest Act*, S.S. 1998, c. M-11.11; *Members' Integrity Act*, S.O. 1994, c. 38; *Code of Ethics and Conduct of the Members of the National Assembly*, S.Q. 2010, c. 30.

frivolous or vexatious or was not made in good faith. Similarly, the Ethics Commissioner may cease an investigation if he or she finds that there are insufficient grounds to warrant an investigation or the continuation of an investigation.

Similar legislation in Quebec grants the Ethics Commissioner the ability to conduct a "verification" in which he or she may gather facts to evaluate whether the request for an investigation was made in bad faith or with the intent to harm.[5] If he or she finds no grounds to support an inquiry, the Ethics Commissioner may terminate the inquiry process and must provide in its annual report reasons for ceasing the inquiry. However, if the Ethics Commissioner began the investigation on his or her own initiative, such an investigation is not required to be recorded in the report.

In the Committee's discussion during the 2005-2006 review a point was raised that other Officers of the Legislature (such as the Ombudsman) have the power to initiate investigations without receiving a signed written request. Therefore it was argued, as an Officer of the Legislature, the Ethics Commissioner should have the same authority. Both the Office of the Ethics Commissioner and all of the stakeholders consulted on this point in that review were also in favour of allowing the Ethics Commissioner to conduct investigations on his or her own initiative. As a result, the recommendation was made in the Committee's report that the Ethics Commissioner should have this power. However, this recommendation was not incorporated into the Act.

According to section 25(2) of the *Conflicts of Interest Act,* when conducting an inquiry, the Ethics Commissioner has the powers, privileges, and immunities of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39, such as the power to summon any persons as witnesses and to compel them to give evidence and produce documents. In the course of an investigation, the Act only provides in section 25(1.1) that "A Member, former Minister or former political staff member shall co-operate with an investigation under this section."

QUESTIONS:

24. **Should the Ethics Commissioner have the power to initiate his or her own investigations based on anonymous tips?**
25. **Should the Ethics Commissioner be provided specific authority to initiate fact-finding inquiries into a potential breach in order to determine whether there is sufficient evidence to warrant an investigation, without triggering an official investigation?**
26. **Should the Ethics Commissioner's investigative powers be clarified for investigations? For example, should the Ethics Commissioner's right to information be specified?**

CONFIDENTIALITY

Under section 26 of the Act, the Ethics Commissioner and employees of the Office of the Ethics Commissioner are to maintain confidentiality of all information and allegations that come to light in the course of their administration of the Act. Additionally, section 40(7) states that employees of the Office of the Ethics Commissioner must take an oath not to disclose any information received by that person under the Act, except as provided in the Act. Section 26(2) allows information and allegations to be

- disclosed to the Member, former Minister, or former political staff member whose conduct is the subject of proceedings;
- disclosed by a person conducting the investigation to the extent necessary to enable that person to obtain information from another person;
- adduced in evidence at an inquiry;
- disclosed in a report made by the Ethics Commissioner;

[5] *Code of Ethics and Conduct of the Members of the National Assembly*. S.Q. 2010, c. 30. s. 95.

- disclosed where necessary for the purpose of advising the Minister of Justice and Solicitor General or law enforcement agency of an alleged offence under this Act.

Based on the above-noted provisions, the Office the Ethics Commissioner is of the view that it is not permitted to respond to media releases by a Member regarding formal advice given by the Office of the Ethics Commissioner or investigations it is conducting. It is also of the view that it may not release full information regarding the formal advice given or investigation it is conducting in response to a Member's press release, which may or may not be a fully accurate representation of the issue. Furthermore, under section 40(8) of the Act, if any employee of the Office of the Ethics Commissioner discloses information that is confidential, that person may be liable to a fine of up to $20,000. Therefore, the Office of the Ethics Commissioner has no authority to inform the public of the complete facts of the formal advice given or investigation it is conducting because it is bound by confidentiality provisions that Members are not.

QUESTIONS:

27. **Should the Office of the Ethics Commissioner have the ability to release information regarding an investigation at its discretion? What are the advantages or disadvantages of the Ethics Commissioner's office disclosing such information?**
28. **Is the list of circumstances in which information may be disclosed appropriate? Should it be more or less restrictive?**

OFFICES AND EMPLOYMENT – THE "COOLING-OFF PERIOD"

Section 31(1) of the Act states that for 12 months after ceasing to be a member of the Executive Council a former Minister may not accept employment from a department of the public service or a Provincial agency with which the former Minister had significant official dealings during his or her last year of service as a Minister. This cooling-off period also applies to soliciting or accepting a contract or benefit from a department of the public service, Provincial agency, person, or entity with which the Minister had significant official dealings. The cooling-off period may ensure that former Ministers in their new places of employment are not seen to have an unfair advantage over others in influencing government decision-making. It also may help avoid any perception that a Minister is using his or her final days in office to curry favour with potential employers.

The Ethics Commissioner may grant exemptions for former Ministers and political staff regarding post-employment obligations. The 2005-2006 Review Committee recommended that the Ethics Commissioner should be given the power to exempt an individual from the general prohibition provided in the Act and allow a former Minister or political staff member to accept employment with the public service provided that in the Commissioner's opinion there is no conflict created between a private interest of that individual and the public interest. Specifically, section 31(3) states that the provisions in subsection (1) do not apply to any activity, contract or benefit

(a) if, in the opinion of the Ethics Commissioner,

  (i) the conditions on which and the manner in which the contract or benefit is awarded, approved or given are the same for all persons similarly entitled, or
  (ii) the award, approval or grant results from an impartially administered process open to a significant class of persons,

or

(b) if in the opinion of the Ethics Commissioner the activity, contract or benefit will not create a conflict between a private interest of the former Minister and the public interest, and the former Minister observes and performs any conditions imposed by the Ethics Commissioner.

The 2005-2006 review recommended that the cooling-off period for Ministers be extended from six months to 12 months and this was subsequently amended in the Act. The length of the cooling-off period is often subject to debate. The above-mentioned rationale may lead one to be predisposed to maintaining or even increasing the duration of the cooling-off period. However, this position should be balanced with a consideration of the ability of a former Minister to obtain gainful employment after leaving elected office. Additionally, a longer cooling-off period may prevent or deter qualified and successful individuals from entering into the public service.

As mentioned above, the Act restricts a Member from finding employment in the public service in a department with which a Minister had "significant official dealings" in his or her last year of service. For the purposes of section 31(1) of the Act, subsection (2) states that

> a former Minister has had significant official dealings with a department of the public service, Provincial agency, person or entity if the former Minister, while in office, was directly and substantively involved with the department, Provincial agency, person or entity in an important matter.

A Minister often works with multiple ministries in his or her time in office and may also be involved in cross-ministry efforts. If a Minister held several portfolios over the last year of his or her service, the 12-month restriction would begin from the date the former Minister ceased to be a member of the Executive Council, rather than from the date he or she ceased that portfolio. For example, if a Member ceases a portfolio within the first month of the 12-month period, he or she may not be permitted to seek employment in that area for a total time of 23 months after ceasing to be a member of the Executive Council. Furthermore, due to the fact that there is a 12-month employment restriction on Ministers and not on Members, the Committee may wish to consider whether compensation should be provided to former Ministers who are not re-elected to their positions and are unable to find employment in their field due to the one year cooling-off period.

Former political staff members are also subject to the same employment restrictions. However, the duration of their restriction is six months. Cooling-off periods apply to some senior officials via regulations under section 23.1 of the *Public Service Act*, RSA 2000, c. P-42 and the *Alberta Public Service Post-Employment Restriction Regulation*. These senior officials are listed as deputy ministers and the positions listed under Salary Range D in Schedule 2 of Order in Council numbered O.C. 318/2012 (see Appendix A) but excluding the position of Chief of Staff, Office of the Premier (who is already caught by the provisions of the *Conflicts of Interest Act*).

QUESTIONS:

29. **Is the 12-month cooling-off period for former Ministers an appropriate length of time?**
30. **Is the six-month cooling-off period for former political staff members and some senior officials an appropriate length of time? Should it be lengthened to match the cooling-off period for former Ministers?**
31. **Is the definition of "significant official dealings" appropriate? If not, how should it be defined?**
32. **Should the Ethics Commissioner have the power to grant exemptions from the cooling-off period? Under what conditions should these exemptions be allowed?**
33. **Are there any other positions in the public service that should be subject to a cooling-off period?**

FOWLER MEMO – SENIOR GOVERNMENT OFFICIALS

"The Fowler Memo" refers to a memorandum written on February 3, 1993, by Richard S. Fowler, former Minister of Justice and Attorney General, to Deputy Ministers and senior officials of Government of Alberta ministries. The memorandum recommends that some of the provisions of the *Conflicts of Interest*

Act be applied to senior officials, whom the memorandum does not explicitly define. The Tupper Report interpreted the Fowler Memo to apply to a group of appointed officials, who included deputy ministers, heads of important provincial agencies, and senior staff in the Premier's Office.

The Fowler Memo specifically includes senior officials among the parties who are required to provide financial disclosure of assets, liabilities, and financial interests, as well as the disclosure of assets, liabilities and financial interests of their spouse, each minor child, and any private corporation controlled by any one of them. However, the memorandum states that, unlike Ministers and Members, the financial disclosures of senior officials will not be made public. Senior officials are also prohibited from owning publicly traded securities, unless such securities are held in a blind trust approved by the Ethics Commissioner, and from taking part in decisions or using their office to further their private interests.

Regarding this memorandum, the Tupper Report also recommended that the term "senior officials" be expanded to include "all assistant deputy ministers, executive assistants, senior staff in the Office of the Leader of the Opposition, and a further group who, in the view of their Minister and the Premier, wield enough policy or administrative influence."[6] The report argues that senior public servants often advise governments on policy initiatives and policy reform, shape regulations, interact with interest groups, negotiate contracts, and procure costly goods and services. For those reasons, appointed officials should also be required to comply with legislation governing potential conflicts of interest. Currently, provincial civil servants are governed by the Code of Conduct and Ethics for the Public Service of Alberta. To date, the provisions of the Fowler Memo pertaining to senior officials, as interpreted in the Tupper Report, have not been incorporated into legislation, although they have been incorporated into employment contracts and terms of employment.

QUESTIONS:

34. **Should the provisions governing financial disclosure and potential conflicts of interest of senior officials recommended by the Fowler Memo be incorporated into the Act?**
35. **If so, how should senior officials be defined and under what capacity should the Ethics Commissioner be able to investigate senior officials?**

EXECUTIVE COUNCIL AND LEADER OF THE OFFICIAL OPPOSITION

Provisions within the Act apply generally to Members of the Legislative Assembly, and certain sections apply specifically to members of the Executive Council and the Leader of the Official Opposition. The Leader of the Official Opposition is subject to the same restrictions on holdings and employment as Ministers. However, leaders of other opposition parties are not subject to these provisions. The rationale provided is that the Official Opposition acts as a government in waiting, and therefore the Leader of the Official Opposition acts as a Premier in waiting. As such, he or she is remunerated in the same way as a Cabinet Minister, and therefore is and should be subject to the rules that apply to Cabinet Ministers as well.

QUESTIONS:

36. **Should the provisions that apply to the Executive Council and the Leader of the Official Opposition also apply to the leaders of other opposition parties?**

[6] Alberta, Conflicts of Interest Act Review Panel, *Integrity in Government in Alberta: Towards the Twenty First Century*, (Edmonton: Conflicts of Interest Act Review Panel, January 1996), p. 50.

SANCTIONS – ETHICS COMMISSIONER'S REPORT

Following an investigation into a breach, whether the investigation is completed or discontinued, the Ethics Commissioner must file a report with his or her findings to the Speaker of the Legislative Assembly. According to section 27(2) of the Act, in the Ethics Commissioner's report, he or she may recommend any one of the following sanctions:

(a) that the Member be reprimanded;
(b) that a penalty be imposed on the Member in an amount recommended by the Ethics Commissioner;
(c) that the Member's right to sit and vote on the Legislative Assembly be suspended for a stated period or until the fulfilment of a condition;
(d) that the Member be expelled from membership of the Legislative Assembly.

In turn, the Assembly, under section 29(1) of the Act, may accept or reject the findings of the Ethics Commissioner or substitute its own findings and may, if it determines that there is a breach, impose sanctions recommended by the Ethics Commissioner, impose any other sanction, or impose no sanctions.

Currently, the Ethics Commissioner can only make recommendations for sanctions under section 25(7) and does not possess the authority to recommend or levy administrative fines (as the Registrar does under the *Lobbyists Act*) or impose sanctions for a breach of the Act. The Ethics Commissioner also does not possess the authority to recommend sanctions or impose fines for failure to comply with disclosure requirements. The only recourse that the Ethics Commissioner has with respect to disclosure is the filing of an annual report with the Speaker of the Legislative Assembly (section 46(1)) in which it reports:

(a) the names of Members who, in the opinion of the Ethics Commissioner,

  (i) have not filed disclosure statements or returns within the time provided by section 11 or 15, as the case may be, or
  (ii) have not made the full disclosure required by section 12

(b) generally on the affairs of the Office of the Ethics Commissioner.

This effectively constitutes public notification of the failure of a Member to fulfill his or her duties to disclose.

QUESTIONS:

37. **The Ethics Commissioner may only make recommendations for sanctions but does not have the ability to impose them. Are these sanctions appropriate?**
38. **Should the Ethics Commissioner be given the authority to levy administrative fines or impose other sanctions for breach of the Act or for non-compliance with advice given by the Ethics Commissioner?**
39. **Should the Ethics Commissioner be given the authority to impose fines or other sanctions for persons who fail to disclose or cooperate with the Office of the Ethics Commissioner in accordance with the provisions of the Act?**
40. **If the Ethics Commissioner is given the authority to impose sanctions or levy administrative penalties, should there be a right of appeal? Who should hear the appeal?**

WORKS REFERENCED

Alberta. Legislative Assembly. Select Special Conflicts of Interest Act Review Committee. *Final Report May 2006.* 2nd sess., 26th Legislature, 2006.

Alberta. Legislative Assembly. Standing Committee on Government Services. *Report on Bill 2: Conflicts of Interest Amendment Act, 2007.* 3d sess., 26th Legislature, 2007.

Select Special Conflicts of Interest Act Review Committee. *Hansard.* June 2, 2005 to May 9, 2006.

Conflicts of Interest Act. RSA 2000. c. C-23.

Conflicts of Interest Act Review Panel. *Integrity in Government in Alberta: Towards the Twenty First Century*. Edmonton, Alberta: Conflicts of Interest Act Review Panel, January 1996.

Alberta. Legislative Assembly. Select Special Conflicts of Interest Act Review Committee. *Reviewing the Conflicts of Interest Act: A Discussion Guide, June 2005.* 1st sess., 26th Legislature, 2005.

APPENDIX A – Senior Officials

O.C. 318/2012 provides the list of "Senior Officials" as of October 3, 2012. This list is amended from time to time.

Alberta Representative in Asia*
Alberta Representative in London*
Alberta Representative in Ottawa*
Alberta Representative in Washington, D.C.*
Chair, Alberta Utilities Commission*
Chair, Energy Resources Conservation Board*
Chief Executive Officer, Alberta Gaming and Liquor Commission*
Chief Executive Officer, Environmental Monitoring*
Chief of Staff, Office of the Premier*
Public Service Commissioner*
Chair, Labour Relations Board
Chair, Land Compensation Board
Chair, Natural Resources Conservation Board
Chair, Surface Rights Board
Chief Appeals Commissioner, Appeals Commission for Workers' Compensation
Chief Delivery Officers, Health and Human Services
Chief Strategy Officers, Health and Human Services
Chief of the Commission and Tribunals, Alberta Human Rights Commission
Controller
Deputy Chief, Policy Coordination
Deputy Clerk of the Executive Council
Deputy Secretary to Cabinet
Director of Communications, Office of the Premier
Director of Operations, Office of the Premier
Executive Director, Office of the Premier, Southern Alberta
Managing Director, Alberta Emergency Management Agency
Managing Director, Public Affairs Bureau
Principal Secretary, Office of the Premier
Chief Advisor on Negotiations
Vice-Chairs, Alberta Utilities Commission
Vice-Chairs, Energy Resources Conservation Board
Members, Alberta Human Rights Commission
Members, Alberta Utilities Commission
Members, Energy Resources Conservation Board
Members, Natural Resources Conservation Board
Vice-Chairs, Labour Relations Board
Vice-Chairs, Surface Rights Board
Appeals Commissioners, Appeals Commission for Workers' Compensation
Members, Land Compensation Board
Members, Surface Rights Board

* Designates Senior Officials listed under Salary Range D.